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# **FUN WITH REVERSE *EJUSDEM GENERIS***

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## Fun with Reverse *Ejusdem Generis*

Jay Wexler\*

*In the canon of statutory construction canons, perhaps no canon is more canonical than the canon known as ejusdem generis. This canon, which translates as “of the same kind,” states that when a statute includes a list of terms and a catch-all phrase, the set of items covered by the catch-all phrase is limited to the same kind or type of items that are in the list. The canon of ejusdem generis has a long and storied history in the law, has been used by judges in countless cases, and has been the subject of a large body of scholarly commentary over the years. Unlike its more famous cousin, the canon of statutory construction known as “reverse ejusdem generis” is far less well known and understood. This canon states that when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase. Unlike ejusdem generis, the canon of reverse ejusdem generis has not been the subject of an enormous body of scholarly commentary over the years. Indeed, it has been the subject of absolutely no scholarly commentary at all.*

*Until now. For the first time in the history of the world, this Article provides a description of the canon, providing historical examples from cases involving such disparate topics as piracy, intoxicating beverages, and hazardous sludge. The Article then analyzes the canon, explaining the linguistic variables that make the canon more or less relevant in any given case. In particular, the Article argues that the more precise the catch-all term in a statute, the more likely the canon should apply to guide the statute’s interpretation. Finally, the Article looks in-depth at the landmark greenhouse gas decision of the Supreme Court in Massachusetts v. Environmental Protection Agency, which posed a reverse ejusdem generis issue even though no party or judge identified it as such. The Article argues that the failure to recognize that the statute posed a recurring interpretive problem rendered the treatment of the relevant statutory provision unsatisfying and unpersuasive. The Article concludes by arguing that courts, scholars, and litigants should recognize the existence of the reverse ejusdem generis canon and indeed call it by that name to ensure that future courts struggling with similar interpretive issues can more easily learn from earlier efforts and reach more informed conclusions.*

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## Introduction

In the canon of statutory construction canons, perhaps no canon is more canonical than the canon known as *ejusdem generis*. This canon, which translates as “of the same kind,” states that when a statute includes a list of terms and a catch-all phrase, the set of items covered by the catch-all phrase is limited to the same kind or type of items that are in the list. To put it another way, in a statutory provision that extends to “A, B, C, and any other Z,” the canon of *ejusdem generis* would advise that every item included in “Z” must be of the same kind as A, B, and C. Thus, the phrase “other foods” in a provision covering “apples, bananas, grapes, oranges, and other foods” would likely refer only to fruits that are not apples, bananas, grapes, or oranges, and the phrase “other sports” in a provision referring to “walking, swimming, biking, running, and other sports” would probably be read to exclude automobile racing. The canon of *ejusdem generis* has a long and storied history in the law,<sup>1</sup> has been used by judges in countless cases,<sup>2</sup> and has been the subject of a large body of scholarly commentary over the years.<sup>3</sup>

Unlike its more famous cousin, the canon of statutory construction known as “reverse *ejusdem generis*” is far less well known and understood.<sup>4</sup> This canon states that

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<sup>1</sup> A search of Professor David Scipp’s database of English Yearbooks reveals that the Latin phrase was used in the statutory construction context at least as far back as the early fourteenth century. *See* <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=5164> (entry for decision from 1321).

<sup>2</sup> A Westlaw search for the phrase in the “Supreme Court” database returns 114 results; the same search in the “Cases” database returns nearly ten thousand results. For a smattering of relevant Supreme Court decisions, see, e.g., *Gooch v. United States*, 297 U.S. 124 (1936); *United States v. Alpers*, 338 U.S. 680 (1950); *Yates v. United States*, 574 U.S. 528 (2015).

<sup>3</sup> *See, e.g.*, “Ejusdem Generis,” 2A Sutherland Statutory Construction § 47:17 (7th ed. 2018); “Ejusdem generis (“of the same kind”); specific words restricting general words,” 82 *Corpus Juris Secundum Statutes*, § 438 (2019); Roderick M. Hills, *The Problem of Canonical Ambiguity in Ali v. Federal Bureau of Prisons*, 44 *TULSA L. REV.* 501 (2009); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Construction*, 100 *MINN. L. REV.* 481 (2015).

<sup>4</sup> The canon of “reverse *ejusdem generis*” should not be confused with what Gregory Englert describes as “the other side of *ejusdem generis*,” which refers to instances when a general term or catch-all phrase precedes a list of terms, rather than follows the list, as in “all foods, including but not limited to apples, oranges, grapes, and bananas,” and the question is whether the catch-all is limited to other examples of

when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase. To put it another way, in a statutory provision that extends to “A, B, C, and any other Z,” the canon of reverse *ejusdem generis* would advise that only those As, Bs, and Cs that are also Zs are covered. Thus, the phrase “iguanas, tortoises, rattlesnakes, and other land reptiles” would likely exclude marine iguanas like those found in the Galapagos Islands, and the phrase “Kansas City, Topeka, Lawrence, Wichita, and other cities in Kansas” would probably not extend to Kansas City, Missouri. Although the canon of reverse *ejusdem generis* has a somewhat long history in the law and has been used by judges in a smattering of cases over time—some quite important, at least one a landmark decision as we’ll see—it didn’t even have a name until the mid-1990s. Moreover, unlike *ejusdem generis*, the canon of reverse *ejusdem generis* has not been the subject of an enormous body of scholarly commentary over the years. Indeed, it has been the subject of absolutely no scholarly commentary at all.<sup>5</sup>

Until now, that is.<sup>6</sup> In this Article, for the first time ever in the history of the world, I provide a comprehensive description and analysis of the reverse *ejusdem generis* canon, with the aim of explaining what exactly the canon says, how courts have used the canon (or not used it), when the canon is particularly useful or not, and what kinds of questions courts ought to consider when deciding whether or not to apply the canon in any specific case. In sum, I argue that, like most other canons of construction, the reverse *ejusdem generis* canon most definitely has its place in the canon of statutory canons, but courts should employ it carefully with special attention to the context of whatever statute happens to be at issue. In particular, I will suggest that the most intriguing and challenging issue related to the canon has to do with the generality of the catch-all term or phrase. When the catch-all term is quite precise, the inference that Congress intended the enumerated terms to be subject to the catch-all’s limits will be rather strong. When the catch-all term is more general, however, such an implication will rest on more tenuous grounds because Congress may have used the general catch-all term simply as a way of describing the list of terms rather than as a way of limiting it.<sup>7</sup>

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the kind appearing in the list as in the paradigmatic *ejusdem generis* situation. See Gregory R. Englert, *The Other Side of Ejusdem Generis*, 2007 THE SCRIBES JOURNAL OF LEGAL WRITING 51. For differing views on this issue, compare *id.* at 52 (describing a case where a court limited the catch-all to the types of things listed and concluding “This decision makes good sense, and applying *ejusdem generis* when the general term comes first appears to be the majority view”) with ANTONIN SCALIA and BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 204-205 (2012) (disagreeing with Englert on both the descriptive and normative questions).

<sup>5</sup> A search for the phrase “reverse *ejusdem generis*” in Westlaw’s “Law Reviews and Journals” database returns only four results, each simply mentioning the canon without providing any analysis.

<sup>6</sup> It’s exciting, isn’t it!?

<sup>7</sup> Throughout this Article, I will refer interchangeably to the authors of hypothetical statutes as “Congress” or “the legislature” or “legislators” or “authors” and the like. I will do so even while conceding that it is of course a bit of a fiction to describe a group of people working together to draft a statute as having a specific intent or purpose. The entire exercise of statutory interpretation and the use of textual canons of construction to guide the interpretation of statutes depends on embracing the same fiction, so I don’t believe I’m engaging in any unique type of error by assuming that we can talk meaningfully about a body of individuals having an identifiable intent.

The Article proceeds as follows: Section I canvasses a wide range of cases addressing the reverse *ejusdem generis* canon, some of which have involved the interpretation of contracts (generally insurance contracts), but most of which have dealt with the interpretation of statutes in areas of law as diverse as piracy, intoxicating liquors, and the regulation of hazardous sludge. Section II probes the benefits and limits of the reverse *ejusdem canon*, drawing on both hypothetical examples and some of the cases described in Section I. In Section III, the Article turns to consider the Supreme Court’s landmark 2007 environmental/administrative law case of *Massachusetts v. Environmental Protection Agency*,<sup>8</sup> in which the Supreme Court held that the EPA has the statutory authority to regulate greenhouse gases. An important part of that decision involved interpreting a statutory provision that posed a classic reverse *ejusdem generis* issue. Although the parties and the Court certainly discussed the best way to read the words of the statute, their failure to recognize that the statute posed a familiar interpretive issue that courts have previously grappled with impoverished the debate over how best to interpret the statute. This observation leads into the Article’s final conclusion, which is that it is important for courts, lawyers, and commentators to recognize the existence of the reverse *ejusdem generis* canon and to in fact call it by that name so that future courts struggling with similar interpretive issues can more easily learn from their efforts and reach more informed and thorough interpretive conclusions.

## I. Reverse *Ejusdem Generis* in the Courts

Although it would be difficult, if not impossible, to provide a comprehensive historical account of how the canon of reverse *ejusdem generis* has been analyzed by the American judiciary over the past couple of hundred years—the fact that the canon didn’t even have a name until recently, for instance, makes it challenging to find relevant older cases—I will in this section describe a sufficient number of decisions to provide a good idea of the variety of contexts in which the canon has arisen over the past two centuries, as well as some of the problems involved in applying the canon. The section starts with a discussion of a nineteenth century piracy case and then considers a set of cases involving intoxicating liquors during the pre-Prohibition years before turning to the modern era.

### A. *United States v. Palmer* (1818).

The first case takes us back to the early 19<sup>th</sup> century and the crime of piracy. In *United States v. Palmer*,<sup>9</sup> three defendants were convicted of violating the so-called “8<sup>th</sup> section of the ‘act for the punishment of certain crimes against the United States,’”<sup>10</sup> which subjected the following people to the death penalty for piracy:

any person or persons [who] shall commit, upon the high seas, or in any river, haven, bason, or day, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed

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<sup>8</sup> 549 U.S. 497 (2007).

<sup>9</sup> 16 U.S. 610 (1818).

<sup>10</sup> *Id.* at 626.

within the body of a county, would, by the laws of the United States, be punishable by death.<sup>11</sup>

The defendants, who had committed robbery on the high seas, argued that since robbery on land was not punishable by death on land in the United States, they were not subject to the piracy statute and should be spared the death penalty.<sup>12</sup> The argument is classic reverse *ejusdem generis*—the terms “murder and robbery” in the statute, it was suggested, must be read to be limited by the catch-all phrase “any other offense, which, if committed within the body of a county, would [be subject to the death penalty].” Only if robbery happened to be punishable on land by the death penalty, under such an interpretation, would robbery on the high seas also be punishable by the death penalty.

Chief Justice Marshall, writing for a divided court, conceded the weight of the defendants’ argument but ultimately rejected this suggested interpretation of the statute. In the defendants’ favor, the Court seemed to acknowledge that only the interpretation put forward by the defendants would give any meaning to the word “other” in the statute.<sup>13</sup> In the end, however, the Court found more powerful the government’s argument that only its interpretation of the statute could explain why Congress had specifically enumerated “murder or robbery”; in the government’s view, if Congress had wanted to limit piracy to those crimes committed on the high seas that were also punishable by death on land, it would have been much easier for it to leave out any mention of any specific crime and simply provide that the death penalty would apply to any offense which if committed on land would be punishable by death. The Court agreed:

The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offences shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery . . . but for the purpose of adding other offences, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of congress been to render the crime of piracy dependent on the punishment affixed to the same offence, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offences, the language of the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 627.

<sup>13</sup> *Id.* at 627-28 (“The argument is understood to be, that congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land . . . That the word ‘other’ is without use or meaning, if this construction by rejected. . . . This argument is entitled to great respect on every account.”). Chief Justice Marshall also cited in the defendants’ favor his concern that “in expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted.” *Id.* at 628.

legislature would have been, that ‘*any offence*’ committed on the high seas, which, if committed in the body of a county, would be punishable with death, should amount to piracy.<sup>14</sup>

In dissent, Justice Johnson began with two basic, big-picture points: that laws imposing capital punishment should be imposed only when a statute is absolutely clear,<sup>15</sup> and that the purpose of the piracy law was to ensure uniformity between how laws would apply on the land and on the high seas.<sup>16</sup> Having established these two points, Johnson’s adoption of the defendants’ proposed interpretation of section eight proceeded in a straightforward fashion: while conceding the force of the Chief Justice’s argument that Congress could have more easily expressed the defendants’ view of the statute by omitting any enumerated crimes altogether,<sup>17</sup> Justice Johnson accepted the argument that the government’s interpretation of the statute rendered superfluous the word “other.”<sup>18</sup> The dissent concluded by noting the unjust potential consequences of the majority’s construction of the statute: “it is literally true,” Justice Johnson wrote, “that under it a whole ship’s crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping and confinement.”<sup>19</sup>

#### B. *The Intoxicating Liquor Cases.*

Skipping ahead some one hundred years or so to the era proceeding federal Prohibition, we find a series of state court cases addressing the question of whether the manufacture, sale, or transportation of *non-intoxicating* malt beverages constituted a violation of state and local intoxicating liquor statutes. The statutes in these cases were all slightly different from each other, but I think it’s fair to suggest that on the most basic and general level the question in each case was whether the sale of a non-intoxicating malt beverage was a violation of a statute roughly prohibiting the sale of any

spirituous, vinous, or malt liquors, or any other intoxicating liquors

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<sup>14</sup> *Id.* at 628-29. The Court also cited in favor of its interpretation the assumption that if the piracy statute was not extended to robbery on the high seas, then such a robbery would “escape unpunished.” *Id.* at 629.

<sup>15</sup> *Id.* at 636-37 (Johnson, J., dissenting) (“And singular as it may appear, it really is the fact in this case, that these mens’ lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone. Upon such a question I here solemnly declare, that I never will consent to take the life of any man in obedience to any court; and if ever forced to choose between obeying this court, on such a point, or resigning my commission, I would not hesitate adopting the latter alternative.”).

<sup>16</sup> *Id.* at 637 (“When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was with regard to crimes which may be committed either on the sea or land, to produce an uniformity in the punishment, so that where death was inflicted in the one case, it should be inflicted in another.”)

<sup>17</sup> *Id.* at 639 (admitting that the government’s interpretive argument is “fair reasoning”).

<sup>18</sup> *Id.* at 637-38 (“Again; there is no reason to think that the word *other* is altogether a supernumerary member of the sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative.”).

<sup>19</sup> *Id.* at 639.



A statute like this clearly raises the issue of whether it should be interpreted pursuant to the reverse *ejusdem generis* canon: should the list of enumerated items (“spirituous, vinous, or malt liquors”) be read as limited by the catch-all phrase (“other intoxicating liquors”)? If so, then only the sale of those spirituous, vinous, and malt liquors that are in fact intoxicating is prohibited, but if not, then the sale of even non-intoxicating spirituous, vinous, and malt liquors is forbidden. The two different readings of the statute would reflect different views of legislative intent; as the Mississippi Supreme Court put it in a case called *Fuller v. City of Jackson*, the legislature either intended “alone to lessen drunkenness” or “to put out of reach of the people drinks which have a tendency to create a thirst for intoxicants.”<sup>20</sup>

The cases come out both ways; there is no uniform method of interpretation, and occasionally the courts specifically reject the approaches taken by other courts.<sup>21</sup> Illustrative are the California appeals court case of *People v. Strickler*<sup>22</sup> from 1914 and the Washington Supreme Court case of *State v. Hemrich* from 1916.<sup>23</sup> In *Strickler*, the defendant was accused of selling a type of malt liquor containing less than one percent alcohol in the small town of Arbuckle, California, about forty miles northwest of Sacramento. The statute that Strickler was charged with violating was a local law prohibiting the sale of “alcoholic liquors,” which the law then defined as including “spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain 1 per cent by volume, or more, of alcohol.” The government argued that the legislature intended to prohibit all spirituous, vinous, and malt liquors, regardless of whether they contained any alcohol at all. The defendant contended that the statute covered only the sale of spirituous, vinous, and malt liquors that contained at least one percent alcohol.

The California appeals court agreed with the defendant, citing the regular *ejusdem generis* canon, even though it was in fact relying on what we now refer to as the reverse *ejusdem generis* canon. Key to the court’s decision was its view of the legislative purpose behind the law, which it believed was clearly to reduce alcohol consumption rather than to prohibit the sale of all malt beverages. Having stated its view of the statute’s purpose, the application of (reverse) *ejusdem generis* was straightforward:

We are still of the opinion, however, that the Legislature did not intend to make it unlawful for one to engage in the business of selling nonintoxicating liquors. . . . This conclusion is arrived at by a view of section 21 of the act by the light of the rule of construction, *ejusdem generis* . . . This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, viz., that

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<sup>20</sup> *Fuller v. City of Jackson*, 52 South 873, 875 (Mississippi 1910).

<sup>21</sup> In addition to *Fuller*, *id.*, and the *Strickler* and *Hemrich* cases discussed below, see also *Marks v. State*, 48 South. 864 (Ala 1909); *La Follette v. Murray*, 91 N.E. 294 (Ohio 1910); *Bowling Green v. McMullen*, 122 S.W. 822 (Kentucky Ct. App. 1909).

<sup>22</sup> *People v. Strickler*, 25 Cal. App. 60 (1914).

<sup>23</sup> *State v. Hemrich*, 161 P. 79 (Wash. 1916).

every part of a statute should, if possible, be upheld and given its appropriate force. . . . But, in this case, since it is plainly manifest . . . that the purpose of the local option law is to suppress drunkenness and consequently the traffic in intoxicating liquors . . . the rule of *eiusdem generis* may be applied to the construction of section 21 without doing violence to or rendering inoperative any part of said section or of the law.<sup>24</sup>

In the *Hemrich* case, the Washington Supreme Court explicitly rejected this analysis in reaching a different interpretation of a state statute quite similar to the one at issue in *Strickler*. In *Hemrich*, the defendant was charged with selling two bottles of a beverage called “Lifestaff,” an unfermented liquid made with six to seven percent malt extract but no alcohol, in violation of a state statute prohibiting the sale of “intoxicating liquor,” defined as including, “whisky, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor, and every other liquor or liquid containing intoxicating properties...”<sup>25</sup> The Washington court discussed *Strickler* and noted the California court’s argument that only an interpretation of the California statute that excluded non-alcoholic liquors could explain the use of the words “or other intoxicating liquors.”<sup>26</sup> The Washington court explicitly disagreed, however, with the California court’s reasoning, stating: “However conclusive this may seem to the court which announced it, it seems far from conclusive to us. . . . The general words, “or other intoxicating liquors,” were intended to add to the things theretofore specifically enumerated, not to take away from or limit what had already been included.”<sup>27</sup> The Washington court then proceeded to criticize the California court’s use of the *eiusdem generis* canon, correctly pointing out that the California court had not employed the traditional rule of *eiusdem generis* but had instead “reverse[d]” that rule: “The [*Strickland*] decision is obviously unsound. It reverses the rule of *eiusdem generis* in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse. . . . The fact is that the rule *eiusdem generis* has nothing to do with the case.”<sup>28</sup>

### C. *Modern Day Cases.*

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<sup>24</sup> *Strickler*, 142 P., at 1122. The court continued: “Indeed, a construction of section 21 by the light of that doctrine will manifestly lead to the upholding of all the provisions of the law agreeably to the evident legislative design at the bottom of its enactment.” *Id.* In the elided portion of the quotation following the first mention of *eiusdem generis*, the court quoted two correct definitions of the regular *eiusdem generis* canon, including one from Lord Tenterden, which states, “Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces ‘other’ persons or things, the word ‘other’ will generally be read as ‘other such like,’ so that persons or things therein comprised may be read as *eiusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.” *Id.* (quoting “Lord Tenterden, 21 Am. & Engl Ency. Of Law, p. 1012”).

<sup>25</sup> *Hemrich*, 161 P. at 82.

<sup>26</sup> *See id.*, at 82.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (definition of “*eiusdem generis*” from Black’s Law Dictionary omitted).

I've been able to identify approximately ten cases (and one executive branch legal opinion) from the modern era—1988 through the present—in which courts have considered whether to apply a reverse *eiusdem generis* analysis to resolve interpretive issues raised before them; most of the cases involve statutory construction,<sup>29</sup> but a few involve interpretation of contracts, typically insurance contracts.

### 1. *Statutory Cases*

Several circuit court cases from the mid-1980s to the mid-1990s involve the federal crime known as engaging in a “continuing criminal enterprise” under 21 U.S.C. 848(c)(2). That statute requires the prosecution to prove, as an element of the crime (typically a drug related offense), that the defendant acted:

in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management

The question raised by the reverse *eiusdem generis* canon is whether the government, if it is claiming the defendant was an organizer or supervisor, needs to also prove that the defendant was in a position of management with respect to the five or more other persons. In other words, if the canon is followed, then an organizer or supervisor who is not in a position of management—assuming that there can be such a thing—would not be covered by the statute.

A relatively early case on the issue from the Tenth Circuit called *United States v. Apodaca* seemed to interpret the statute consistently with the reverse *eiusdem generis* canon, although the decision is hardly crystal clear. In laying out its interpretation of the statute in response to the defendant’s claim that the evidence produced at trial was insufficient to convict him as either an organizer, a supervisor, or a manager, the court appeared to assume that to be covered by the statute, the defendant must have played some managerial role. Quoting an earlier case from the Eighth Circuit, the court wrote that: “The defendant need not even have been the *dominant* organizer or manager of the enterprise; ‘the statute requires only that he occupy some managerial position’ with respect to five or more persons.”<sup>30</sup> On the other hand, however, the court also seemed to assume that playing a managerial role is an inherent aspect of being an organizer or supervisor, which suggests that the phrase “any other position of management” is merely a general term meant to describe people who organize or supervise (and perhaps do other things as well that are not enumerated) rather than a term intended to limit those who might otherwise fall into the category of organizer and supervisor. As the court put it: “The use of the phrase, ‘any *other* position of management,’ indicates that ‘organizer’ and ‘supervisor’ are but two examples of managerial roles; there may be others. Additionally, ‘organizer’ and ‘supervisor,’ understood according to their ordinary meanings, can denote differing levels of managerial control and

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<sup>29</sup> In addition to the cases described below, *see also* *United States v. Sattar*, 314 F.Supp.2d 279, 297-98 & n. 8 (S.D.N.Y. 2004) (rejecting a proposed definition of a federal statute that was based on the reverse *eiusdem generis* canon).

<sup>30</sup> *United States v. Apodaca*, 843 F.2d 421, 426 (1988).

coordination.”<sup>31</sup> Overall, the decision gives the impression that there simply cannot be organizers or suppliers who do not play at least some managerial role, and that therefore the reverse *ejusdem generis* canon has no role to play in the interpretation of the statute.

Two later cases from the Ninth Circuit, however, clearly do interpret the statute in a reverse *ejusdem generis* manner, both curiously citing *Apodaca* for support. In *United States v. Jerome*, the defendant argued that he was not an “organizer” with respect to two of the suppliers cited by the government as constituting a fraction of the “other persons” required by the statute. The court parsed the statute in a reverse *ejusdem generis* manner without explicitly using any particular interpretive canon:

We read the statutory language “or any other position of management” to indicate that an “organizer” must exercise some sort of managerial responsibility; one does not qualify if one simply sets up a system of supply. [citation to *Apodaca* omitted] Every legitimate retail store makes arrangements with its regular suppliers. In one sense it may be said to organize its supply, but does it organize its suppliers? Surely not in the sense of being the manager of its suppliers. To be an organizer within the sense of the statute more is required than simply being a steady customer.<sup>32</sup>

Quoting this paragraph in full, a two judge majority on a Ninth Circuit panel relied on the *Jerome* court’s interpretation of the statute two years later to reverse a defendant’s conviction on the basis that the government’s evidence at trial was insufficient to show he had acted in a managerial position with regard to several of his drug-distributing customers. The dissent in *United States v. Delgado*—written by Judge Cynthia Holcomb Hall—thought it was sufficient for the government to prove the defendant had acted to organize his customers without having to demonstrate that he exercised day-to-day management authority over them. Judge Hall refused to employ anything like the reverse *ejusdem generis* canon in interpreting the statute; for her, the terms “position of organizer,” “supervisory position,” and “any other position of management” constituted three independent possible categories of defendants, and the catch-all phrase “other position of management” did not act to limit the two categories.<sup>33</sup> The majority, however, disagreed, citing *Jerome* and explaining the reverse *ejusdem generis* canon in the most thorough way thus far in the caselaw, though without actually naming it:

The syntax of the statute, “A, B, or any other C,” implies that A must fall within the class C; that is, organizers are counted only if they exercise some sort of managerial responsibility. By analogy, a statute regulating fishing may state that licensed individuals may catch up to some specified limit of “bass, trout, or any other fresh water fish.” The limits would apply to fresh water bass, such as black bass, but not to

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<sup>31</sup> *Id.*

<sup>32</sup> *United States v. Jerome*, 942 F.2d 1328, 1331 (9<sup>th</sup> Cir. 1991).

<sup>33</sup> See *United States v. Delgado*, 4 F.3d 780, 786 (Hall, J., dissenting).

sea bass, because the clause “or any other fresh water fish” limits “bass” and “trout” to those in fresh water. Likewise, under the continuing criminal enterprise statute, it is not enough to be just a non-managerial organizer.<sup>34</sup>

Three years later, in characterizing the Ninth Circuit’s decisions in both *Jerome* and *Delgado*, Judge Williams of the DC Circuit Court of Appeals finally gave the reverse *eiusdem generis* canon its name. In response to a defendant’s argument that drug suppliers cannot “in the nature of things, occupy the sort of subordinate or ‘managee’ position necessary under the [CCE] statute,” the court in *U.S. v. Williams-Davis*<sup>35</sup> found that the defendant had relied on “too broad a reading” of the Ninth Circuit’s cases. The Ninth Circuit, Judge Williams explained, had not ruled suppliers out in the way that the defendant suggested but rather simply made clear that to count as a relevant individual for the CCE statute, those suppliers had to in fact be managed by the defendant. “The later decision in *Delgado* explained the outcome [in *Jerome*] as a matter of syntax,” Williams wrote. “Applying a sort of reverse *eiusdem generis* (where the general term reflects back on the more specific rather than the other way around), it said that the phrase ‘A, B, or any other C’ indicates that A is a subset of C, so that the reference in [the CCE statute] to an ‘organizer’ or a holder of a ‘supervisory position’ requires some sort of managerial capacity.”<sup>36</sup> The court went on to find it quite unlikely that the jury might have relied on a “non-managed supplier to reach the number five,” and upheld the defendant’s conviction.<sup>37</sup>

In two other cases from very different statutory contexts, the same Judge Williams from *Williams-Davis* relied explicitly on the reverse *eiusdem generis* canon of construction to reject claims brought against the government. In *Dong v. Smithsonian Institution*,<sup>38</sup> decided in 1997, the issue was whether the Smithsonian constituted an “agency” for purposes of the Privacy Act.<sup>39</sup> The relevant provision of that statute defined “agency” as including:

...any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including

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<sup>34</sup> *United States v. Delgado*, 4 F.3d 780 (1993).

<sup>35</sup> 90 F.3d 490 (D.C. Cir. 1996).

<sup>36</sup> *Id.* at 508-09.

<sup>37</sup> *Id.* at 509.

<sup>38</sup> 125 F.3d 877 (D.C. Cir. 1997).

<sup>39</sup> The facts of the case were quite interesting. Margaret Dong worked at the Hirshhorn Museum and Sculpture Garden in Washington D.C., where part of her job was to accompany works of art that the Hirshhorn lent to other museums. In 1993, Dong accompanied a painting called “Circus Horse” to the Museum of Modern Art in New York without asking for permission, purportedly to avoid conflict with a co-worker. When Dong’s supervisors got wind of what had happened, they contacted representatives at MOMA directly rather than confronting Dong and ultimately suspended her for five days. Dong then sued the Smithsonian under the Privacy Act, which, as the court put it, “requires federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual ‘to the greatest extent practicable.’” *Id.* at 878.

the Executive Office of the President), or any independent regulatory agency.<sup>40</sup>

The court began by noting that only two of the categories contained in this provision could possibly describe the Smithsonian: “establishment in the executive branch” and “Government controlled corporation.”<sup>41</sup> After rejecting the possibility that the Smithsonian could be an “establishment in the executive branch” both because most of the members of its governing board come from outside the executive branch and because it does not “engage in any . . . typically executive activity,”<sup>42</sup> the court turned to the question of whether the institution might be a government controlled corporation. Although Judge Williams believed there was “much force” to the Smithsonian’s argument that it was neither government controlled nor a corporation,<sup>43</sup> he ultimately found that the reverse *eiusdem generis* canon made it unnecessary to consider those questions:

[The statute] first identifies four specific categories . . . and then uses a catch-all phrase to encompass similar entities not precisely fitting any of the four specific molds: “or *other* establishment in the executive branch” (emphasis added). Thus Congress evidently viewed the four specified classes as examples of “establishments in the executive branch,” so that an entity clearly outside the executive branch would not qualify even if it could otherwise be shoehorned into the concept of a “Government controlled corporation.” This is the most logical reading of the statute; for those who collect canons of construction it might be termed an application of “reverse *eiusdem generis* (where the general term reflects back on the more specific rather than the other way around, [so] that the phrase ‘A, B, or any other C’ indicates that A is a subset of C.” [citing *U.S. v. Williams-Davis*.]<sup>44</sup>

Since the court had already determined that the Smithsonian was not within the executive branch, it followed that it could not be a “Government controlled corporation” for purposes of the statute.<sup>45</sup>

In the 2003 case of *Safe Food and Fertilizer v. EPA*, Judge Williams once again applied the reverse *eiusdem generis* canon in the context of the federal solid waste statute known as the Resource Conservation and Recovery Act, or RCRA. In that case, the EPA had issued a rule finding certain recycled materials used to make zinc fertilizers

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<sup>40</sup> 5 U.S.C. sec. 552(f).

<sup>41</sup> *Dong*, 125 F.3d, at 879.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 879-880. The Office of Legal Counsel in the U.S. Department of Justice reached a similar conclusion about the Smithsonian in the context of the Ethics in Government Act of 1978, relying in part on the DC Circuit’s analysis in *Dong*. See John Elwood, Office of Government Ethics Jurisdiction Over the Smithsonian Institution (Feb. 29, 2008), located at <https://www.justice.gov/olc/opinion/office-government-ethics-jurisdiction-over-smithsonian-institution>.

did not constitute “solid waste” under RCRA and thus were not subject to the statute’s strict handling and storage regulations. The statute defines “solid waste” as:

. . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and any other discarded material.<sup>46</sup>

EPA’s theory was that under the statute and a series of D.C. Circuit cases interpreting the word “discarded” as it appears in RCRA, the recycled materials—sludges produced by air pollution control facilities—were not discarded because they were being immediately used to make zinc fertilizers. Petitioners challenged the rule, arguing that under the statute, all sludges from air pollution control facilities were necessarily “solid wastes” even if not discarded. Judge Williams conceded that such an interpretation was possible, but he nonetheless concluded that the agency’s reading was also reasonable and thus entitled to deference under *Chevron*.<sup>47</sup>

The enumeration of specific types of solid waste prior to the catch-all “other discarded materials” might mean that the enumerated materials are always “solid waste” for RCRA purposes, regardless of the prevailing understanding of “discarded.” But the EPA urges that the phrase “other discarded materials” should be read to mean that the listed materials are solid waste only if they are also “discarded.” This reading is also sensible, as well as consistent with the “reverse *eiusdem generis*” principle occasionally invoked by this court, under which “the phrase ‘A, B, or any other C’ indicates that A is a subset of C,” [citing *Williams-Davis and Dong*]. We cannot find that the statutory text precludes the EPA’s reading.<sup>48</sup>

## 2. *Contract Cases.*

In addition to these cases involving statutory interpretation, a handful of cases employ the reverse *eiusdem generis* canon in the context of interpreting contracts, typically insurance contracts.<sup>49</sup> Illustrative is the case of *SMI Realty Management Corporation v. Underwriters at Lloyd’s, London* from a court of appeals in Texas.<sup>50</sup> There, a real estate management corporation brought an insurance claim to recover costs from a quickly occurring (non-gradual) underground plumbing leak at an apartment

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<sup>46</sup> 42 U.S.C. sec. 6903(27).

<sup>47</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts should defer to reasonable agency interpretations of ambiguous statutes).

<sup>48</sup> *Safe Food and Fertilizer*, 350 F.3d, at 1269.

<sup>49</sup> In addition to the two cases discussed below, *see also* *National Football League v. Vigilant Insurance Co.*, 36 A.D. 3d 207 (2006) (holding that an employment practices exclusion clause in an insurance contract was inapplicable based on the NFL’s reverse *eiusdem generis* argument); *Bristol-Myers Squibb Co. v. United States*, 48 Fed. Cl. 350 (2000) (analyzing reverse *eiusdem generis* claim in case involving government license to make and sell compounds used in HIV drugs); *Bighorn Lumber Co, Inc. v. United States*, 49 Fed. Cl. 768, 771 (2001) (“A ‘reverse *eiusdem generis*’ principle has been recognized, whereby the broader category could help define the scope of the specific example.”).

<sup>50</sup> 179 S.W.3d 619 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2005).

complex that it managed. The insurance company claimed that the damage was covered by an exclusion in its contract with the management corporation which excluded damage from:

Wear, tear or gradual deterioration; Wet rot, dry rot or mould; Spoilage, decay or decomposition; Normal settling, shrinking or expansion in buildings; structures or foundations; Corrosion or rust; Erosion; Leakage; any other gradually occurring loss; or any loss which commenced prior to the inception of this Certificate.<sup>51</sup>

According to the insurance company, the clause excluded damage caused by any sort of leak, regardless of whether the leak was sudden or gradual. In response, the management corporation argued for an interpretation of the clause informed by the reverse *eiusdem generis* canon, claiming that the “other gradually occurring loss” language limited the clause’s exclusion of “Leakage” to only gradual leaks. The court agreed that such an interpretation was reasonable:

In essence, SMI is offering the reverse of the interpretive canon of *eiusdem generis*. . . . The “reverse *eiusdem generis*” principle has been applied by courts to allow a broader category to define the scope of a more specific example [citing *Dong* and *Williams-Davis*]. Similarly, SMI contends that the policy excludes only gradually occurring leakage, but not sudden leakage, because the phrase “any other gradually occurring loss” limits the scope of “Leakage” to that which is gradually occurring. That is, “Leakage” is modified by, and a subset of, “any other gradually occurring loss.” We conclude that such a reading of the term “Leakage” is reasonable.<sup>52</sup>

Although the court conceded that the insurance agency’s interpretation was also reasonable—primarily based on the agency’s argument that the semicolon separating “Leakage” and “any other gradually occurring loss” served to show that “the two phrases have independent significance, and . . . do not depend on each other for meaning”<sup>53</sup>—it nonetheless applied a separate doctrine to find that ambiguous insurance contracts should be construed against the insurer and found for the

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<sup>51</sup> *Id.* at 623.

<sup>52</sup> *Id.* at 624-25. The court rejected the insurance company’s argument that the management company’s interpretation of the word “Leakage” rendered it superfluous since “the loss would be excluded simply by the phrase ‘any other gradually occurring loss.’” According to the court: “The relevant phrases of the policy exclusion can be read to avoid superfluities. The exclusion lists numerous, specific perils that are excluded, including ‘Leakage.’ The exclusion also contains the catch-all phrase ‘any other gradually occurring loss,’ which strives to exclude from coverage any gradually occurring losses not previously encompassed within the exclusion. In other words, the ‘any other gradually occurring loss’ phrase can be reasonably read to indicate that the terms preceding it in the paragraph are not exhaustive. Construed in this manner, neither ‘Leakage’ nor ‘any other gradually occurring loss’ is rendered superfluous.” *Id.* at 626.

<sup>53</sup> *Id.* at 626.



management company.<sup>54</sup> A dissenting judge would have found for the insurance company based on the company’s semicolon argument.

In another insurance contract interpretation case—*Lantheus Medical Imaging, Inc. v. Zurich American Insurance Co.*<sup>55</sup>—a federal district court in New York rejected an argument that was based on the reverse *ejusdem generis* canon. There, a manufacturer of medical imaging products filed an insurance claim to recover losses resulting from rapid corrosion of an aluminum wall at a nuclear reactor that supplied a radioactive isotope necessary for the manufacturer’s business. Although the insurance policy contained an exclusion for “corrosion,” the manufacturer argued, based on the language of the policy’s relevant clause, that only corrosion occurring “inevitably over the useful life of the machine,” was excluded from coverage. The clause provided:

We will not pay for loss or damage resulting from any of the following . . . Deterioration, depletion, rust, corrosion, erosion, loss of weight, evaporation[,] or wear and tear[.]<sup>56</sup>

According to the manufacturer, the phrase “wear and tear” was a catch-all phrase that limited the prior enumerated causes, such that only corrosion (or rust, erosion, etc.) occurring as part of the ordinary wear and tear of the reactor was excluded. “Relying on a somewhat obscure canon of construction, ‘reverse *ejusdem generis*,’” the court explained, “Lantheus argues that, because the string of excluded causes ends with ‘wear and tear,’ all of the preceding excluded causes listed must be read to be a subset thereof.”<sup>57</sup> The court rejected this argument for two reasons. First, the court determined that since the phrase “wear and tear” lacked “any hallmark of being a ‘catch-all,’” the canon simply didn’t apply: “While the phrase appears at the end of the list, the exclusion is not preceded by an adjective—such as “other”—that would hint toward the purpose of establishing ‘wear and tear’ as the general class.”<sup>58</sup> Second, the court pointed to the enumerated term “evaporation” and concluded, presumably on the grounds that evaporation would never occur inevitably over the life of the machine, that the canon could not apply: “It has long been recognized that *ejusdem generis* cannot be called into play when the specific terms preceding the general one do not themselves have a common attribute from which a ‘kind or class’ may be defined. A comparison of the processes of evaporation and corrosion simply does not suggest ‘inevitable wear and tear’ as a conceivable umbrella term.”<sup>59</sup>

## II. The Uses and Limits of Reverse *Ejusdem Generis*

Courts use textual canons of construction as guidelines for how to make sense of potentially unclear statutory language.<sup>60</sup> The canons are by no means

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<sup>54</sup> *Id.* at 623, 626.

<sup>55</sup> 255 F.Supp.3d 443 (S.D.N.Y. 2015).

<sup>56</sup> *Id.* at 446.

<sup>57</sup> *Id.* at 459-460 (citing *Williams-Davis*).

<sup>58</sup> *Id.* at 460.

<sup>59</sup> *Id.* at 460 (citation and internal quotations omitted).

<sup>60</sup> See WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK, VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 448

determinative.<sup>61</sup> They don't function, for example, like judicial precedents, but rather are starting points or presumptions for thinking about how to read a statutory provision. In any given case, the context of the statutory provision or the legislative history or simply common sense may make application of an otherwise applicable canon of construction inapplicable. Nonetheless, lawyers (and law students) need to be aware of these canons and be able to use them to argue in favor of whatever interpretation of a statute will favor their client and case.<sup>62</sup> In this sense, they are like tools in the lawyer's toolbox, or, as I used to like to say when I taught a course in legislation and statutory interpretation, they are like dance moves. If your client needs you to dance the *noscitur a sociis*, for example, then you need to be able to put on the moves. But if the statute is singing an *inclusio unius exclusio alterius* tune, then you better have that in your repertoire as well.

Although it is hardly possible to identify in the abstract every single potential factor that might weigh in favor of the applicability of using a canon in any specific statutory context, it is generally possible to identify at least some factors or contexts that will likely make the canon either more or less useful. In *Reading Law*, their comprehensive survey of interpretive techniques, Antonin Scalia and Bryan Garner provide just this kind of analysis of many of the key statutory canons, including the garden variety *eiusdem generis* one.<sup>63</sup> For instance, they point out that the canon "generally requires at least two words to establish a genus—before the *other*-phrase,"<sup>64</sup> that the canon will not apply when "the specifics do not fit into any kind of definable category,"<sup>65</sup> and that "when the specifics exhaust the class and there is nothing left besides what had been enumerated, the follow-on general term must be read literally."<sup>66</sup> In the rest of this section, my aim is provide a similar type of analysis for

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(2014) ("Textual canons help interpreters identify or resolve ambiguities and enable interpreters to narrow the range of meanings for vague terms as well."). Textual canons can be usefully distinguished from so-called "substantive canons," which are not focused on grammar or word-choice but instead represent policy rationales, such as the rule of lenity, which suggests that courts ought to read ambiguous statutes to favor the defendant. *See id.* at 490 (describing substantive canons), 494 (describing the rule of lenity).

<sup>61</sup> *See id.* at 450 ("Courts do not apply the textual canons as hard-and-fast rules; they are inconsistently applied and, at best, presumptions and might be considered more like adages.")

<sup>62</sup> *See* HILLEL L. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 4 (2014) ("Beyond the broad theoretical approaches to statutory interpretation, there are many practical tools of interpretation that you will have to master to become a successful lawyer. Some of these tools are referred to as 'rules' and others as 'canons.'")

<sup>63</sup> SCALIA AND GARNER, *supra* note 4, at 199-213.

<sup>64</sup> *Id.* at 206. For instance, while noting that there are cases to the contrary, the authors suggest that if there's only one enumerated item—such as in the phrases "my car and all other property" or "no dogs or other animals"—then there's no way to know what common property should distinguish all items covered by the class. So for instance, the authors write, of the car example: "There is no reason to conclude, from the single specification of *car*, that the testator had only personal property in mind."

<sup>65</sup> *Id.* at 208. As an example, the authors point to a case where "the general words *all manner of merchandise* were held not to be limited by a preceding enumeration of fruit, fodder, farm produce, insecticides, pumps, nails, tools, and wagons." *Id.* (citing *Heatherton Coop. v. Grant*, [1930] 1 D.L.R. 975 (N.S.)).

<sup>66</sup> *Id.* at 209. The example the authors give is a statute referring to "federal Senators, federal Representatives, and other persons." The commonality between the two enumerated items is that they are both federal legislators. But since the only types of federal legislators are Senators and Representatives, the "other persons" category can't logically be limited only to federal legislators,

reverse *ejusdem generis*, explaining the strengths of the canon, the necessary elements of the canon, and some of the factors that will likely make the canon either more or less likely to be applicable in any given circumstance.

At the outset, it is worth observing that the canon can in fact work as a potential guide for reading an ambiguous statute. In a statute that refers to “A, B, C, and any other Z,” where, for instance, some As are Zs but other As are not Zs, it will often make sense to presume that the author intended only to include those As that are Zs because the Z is highly probative as to the nature of the category of items the author had in mind when writing the statute. For example, in the hypothetical statute I described earlier in the Article which extended to “iguanas, tortoises, rattlesnakes, and other land reptiles,” the term “land reptiles” certainly suggests, at least without any evidence to the contrary, that the author(s) of the statute meant to cover only those iguanas that are in fact land reptiles and not those iguanas that live in the water. The Z phrase gives the reader some idea of the type of animals the author thought he or she was listing by specifying A, B, and C. The Z represents the category that the author intended to illustrate with the A, B, and C, and if there happen to be some As or Bs or Cs that happen not to also be Zs—and particularly if there is no other reason to think that the author specifically did want to include those As or Bs or Cs that are not Zs—then excluding anything that happens not to be a Z from the coverage of the statute may very well be the most coherent way to interpret the statute.

Moreover, as Chief Justice Marshall recognized in his opinion in *Palmer*, interpreting a statute using the canon of reverse *ejusdem generis* will often be the only way to make sense of the word “other” that frequently precedes the catch-all phrase.<sup>67</sup> Compare a statute that extends to “iguanas, tortoises, rattlesnakes, and other land reptiles” to one that extends to “iguanas, tortoises, rattlesnakes, and all land reptiles” or one that extends to “iguanas, tortoises, rattlesnakes, and land reptiles.” What function could the word “other” play in the initial statute other than pointing out that the items in the enumerated list are meant to be illustrative of the catch-all and therefore should be limited by it? Since one of the most basic canons of construction posits that courts should strive to give meaning to each and every word in a statute,<sup>68</sup> it would seem that the canon of reverse *ejusdem generis*, which is the only way to give meaning to the word “other,” should carry the day.

On the other hand, it is of course true that legislatures are hardly perfect wordsmiths when crafting statutes, and it is no difficult matter to locate examples where courts have interpreted statutes in a fashion that does not give meaning to every single word.<sup>69</sup> Moreover, it is also true, as Chief Justice Marshall seemed to recognize

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because there would be nobody who could fit into “other persons” who weren’t already covered by the two enumerated types of legislators. Thus, “other persons” must be read literally.

<sup>67</sup> See text accompanying note 13, *supra*.

<sup>68</sup> This canon is often referred to as the “rule against surplusage” or some variant thereof. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 2d. ed. 228 (2013) (“interpretations that render certain statutory language superfluous are disfavored.”).

<sup>69</sup> See Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 108-09 (2018) (collecting reasons why the Court has refused to use the rule against surplusage in the past decade with citations to cases)

in *Palmer*, that the rule against surplusage will tend to cut both ways in any case in which the reverse *eiusdem generis* canon is invoked.<sup>70</sup> This is because there will always be the question: why did the legislature specify any enumerated items rather than just using the catch-all? In other words, why not have the statute extend simply “to all land reptiles” rather than listing a few examples of land reptiles and then using the catch-all “other land reptiles”? The words “iguanas,” “tortoises,” and “rattlesnakes” all become technically unnecessary if the proper reading of the statute is simply to cover “all land reptiles.” The compelling argument that reverse *eiusdem generis* is the only way to make sense of the word “other,” then, will often if not always run up against the equally compelling argument that if the legislature wanted to restrict the enumerated items to those that fit into the category of the catch-all, it would have been much easier for it to have simply ditched the enumerated list and let the catch-all speak for itself.

A few of rules of thumb regarding the reverse *eiusdem generis* canon, though, do seem on fairly sure footing. For one thing, as the court in the afore-described *Lantheus* decision pointed out, for the canon to apply the statute must contain an explicit catch-all word or phrase.<sup>71</sup> Without such a word or phrase, the canon simply makes no sense, as it is the “other,” or some functional equivalent, that links the catch-all with the enumerated items such that the items can plausibly be described as limited by the catch-all. Thus, in a statute that covers “peppers, cucumbers, and green vegetables,” there would be no reason to assume that the phrase “green vegetables,” even though it refers to a broader category than the two terms preceding it, would necessarily exclude red peppers, while a provision that refers to “peppers, cucumbers, and other green vegetables,” likely would.<sup>72</sup> It is important to note here that a catch-all can come in different forms and can just as easily precede the list of enumerated terms as follow it. For instance, there is no meaningful difference between a statute that extends to “peppers, cucumbers, and other green vegetables” and one that extends to “all green vegetables, including peppers and cucumbers.” The latter, just as the former, could easily be read to exclude red peppers. Indeed, in *Massachusetts v. EPA*, which will be discussed at length later in the Article,<sup>73</sup> the catch-all preceded the enumerated list rather than the other way around.

Second, as the court in *Lantheus* also observed, if one or more of the enumerated items in the list could not possibly be a subset of the catch-all, then the argument that one or more other items in the list should be limited to the catch-all loses its force. In *Lantheus*, for instance, the court explained that since “evaporation” could not reasonably be described as an example of “wear and tear,” then it follows that the other items in the list could not be limited by the phrase “wear and tear”

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<sup>70</sup> See text accompanying note 14, *supra*.

<sup>71</sup> See text accompanying note 58, *supra*.

<sup>72</sup> The canon of *noscitur a sociis*, which holds that words should be known by their neighbors, might be invoked in the former hypothetical statute as a way of arguing the exclusion of red peppers even without a catch-all, but the argument would be weaker and would not, of course, rely on the subject of this discussion, the reverse *eiusdem generis* canon. For a discussion of the canon of *noscitur a sociis*, see MANNING & STEPHENSON, *supra* note 68, at 226-28.

<sup>73</sup> See text accompanying notes 77-117, *infra*.

either.<sup>74</sup> A simpler example might be a statute that extends to “peppers, cucumbers, carrots, and other green vegetables.” Since carrots are not green, the argument that the statute only covers green peppers and not red ones would seem to be exceedingly weak.

Third, it is probably the case that the longer the list of enumerated items that clearly fall within the catch-all, the stronger the argument that all of the items should be limited by the catch-all. Compare, for instance, a statute that refers to “Kansas City, Topeka, and other cities in Kansas” with one that refers to “Kansas City, Topeka, Lawrence, Olathe, Wichita, Overland Park, and other cities in Kansas.” Which of the two statutes is more easily read to exclude Kansas City, Missouri? Not that the question is necessarily a slam dunk—some other contextual clue or piece of legislative history or the like might push in the opposite direction—but the statute with the long list of cities in Kansas is more clearly read to exclude the Missouri city since that long list is evidence that the author(s) of the statute had in mind exclusively cities within the state of Kansas.

On the other hand, unlike with regular *ejusdem generis*, it is not imperative that the list of enumerated items be at least two items long for the reverse *ejusdem generis* canon to apply. The rationale for the requirement with the garden variety *ejusdem generis* is that without at least two items it becomes impossible to know what shared characteristic should be used to limit the items that fall under the catch-all. Thus, in a statute extending to “bananas and other foods,” the argument that only foods that are fruits are covered by “other foods” is a weak one; perhaps the author only meant to include yellow foods, or long and slender foods, or all foods—it’s impossible to tell. On the other hand, with reverse *ejusdem generis*, the principle that the reader can infer limits on the enumerated items from the nature of the catch-all phrase does not necessarily depend on the list of items being greater than one (although as noted above, the argument likely gets stronger as the list grows longer). In a statute extending to “peppers and other green vegetables,” for instance, it is certainly plausible that the author intended to limit the statute to green peppers and not to include red or yellow ones.

Fourth, the more it is generally known that an enumerated item contains a subset that would not be covered if the catch-all is read to limit the item, the better the argument for applying the reverse *ejusdem generis* canon. Or to put it the opposite way, if a reasonable person would be surprised to find out that a subset of an enumerated item would be excluded if the catch-all were applied to limit that item, then it will be less plausible that the catch-all should be read in that manner. For instance, is it widely known that some iguanas swim? If the fact is widely known, then a statute extending to “iguanas, tortoises, rattlesnakes, and other land reptiles” would be more reasonably read to exclude marine iguanas than if the fact were exceedingly obscure. In the former case, the inference that the authors of the statute knew they were excluding a subset of iguanas and intended that result when they wrote the catch-all is more plausible than if they had no idea there were swimming iguanas. In a

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<sup>74</sup> See text accompanying note 59, *supra*.

situation where the fact is exceedingly obscure, it is more plausible (though by no means certain) that the authors did not intend to exclude anything with the catch-all, since they likely didn't know that there was anything to be excluded in the first place.

This principle will obviously do more work in some cases than in others. Of the actually-decided cases described above, for instance, the principle would seem to have some force in the intoxicating liquor context. Did state legislators seeking to prohibit the sale of “spirituous, vinous, or malt liquors, or any other intoxicating liquors” intend to prohibit the sale of non-intoxicating malt liquors? One relevant question would be whether it was likely that the relevant legislators were aware of the existence of non-alcoholic malt beverages. If they were aware of the existence of such products, then one could make a strong argument that the legislators knew they were excluding them by referring to “intoxicating liquors” in the catch-all. Since it seems highly likely that the legislators were aware of the existence of non-intoxicating malt beverages, then it would seem that the California court in *Strickler* probably had a better view of the law than the Washington court did in *Hemrich*. Of course, this particular principle is not necessary to such a view—one could plausibly conclude, for instance, that the authors would have wanted to exclude non-intoxicating malt liquors even if they hadn't known of their existence—but it does make the case for exclusion stronger.

Fifth and finally, the most interesting and perhaps most important linguistic issue when it comes to deciding whether to apply the reverse *ejusdem generis* canon in any particular case has to do with the specificity or generality of the catch-all phrase. The more precise the catch-all, the stronger the case will generally be for applying the reverse *ejusdem generis* canon to limit the list of enumerated items. An amorphous, nebulous catch-all phrase, on the other hand, may represent nothing more than the author of the statute's attempt to find some word or phrase that can adequately describe the list of items rather than any intent to limit those items. One way of probing the level of precision of the catch-all phrase in any given case will generally be to ask how obviously it would in fact limit one or more of the enumerated items.

For example, perhaps you've been wondering as you've been reading this article whether it's really as clear as I've been suggesting that a marine iguana is not a “land reptile.” After all, it's not like marine iguanas spend all of their time in the water. In fact, they can only spend about thirty minutes submerged under the water and spend most of their time on the land. What is a “land reptile” anyway? Is it an animal that can't spend any time at all in the water? One that spends most of its time on the land? I like to occasionally swim, but I don't think that means I'm not a “land mammal.” Maybe the authors of the statute just used the phrase “land reptiles” because they needed some way to describe iguanas, tortoises, and rattlesnakes and didn't know what other phrase to use (assume they really, really didn't want to cover sea snakes). But imagine if the hypothetical statute specified more precisely what was covered by the catch-all. Imagine if it said, “iguanas, tortoises, rattlesnakes, and other reptiles that cannot remain submerged under water for more than ten minutes at a time.” In that case, it would be clear that the authors of the statute intended to exclude marine

iguanas. The case for employing the reverse *eiusdem generis* canon would be very strong indeed.

To return to one of our actual cases, consider again the continuing criminal enterprise statute that was the subject of the *Apodaca*, *Jerome, Delgado*, and *Williams-Davis* cases. Recall that the statute applies to defendants who act “in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management.” The question is whether the statute should be read to exclude organizers or supervisors who do not have a managerial position. But the phrase “position of management” is hardly precise. It is quite possible, as the court in *Apodaca* suggested, that there really cannot be an organizer or supervisor who does not occupy a managerial position. Perhaps the phrase “position of management” was simply chosen as a phrase that would seem to accurately describe what organizers and supervisors have in common. If the phrase instead was something like “any other position in which the person can give orders and expect them to be followed by everybody in the enterprise,” then it would be clear that organizers and supervisors who would not expect to have their orders followed would be excluded. Again, the more precise the catch-all, the more plausible the reverse *eiusdem generis* reading.

As I observed at the beginning of my discussion of statutory canons, for most judges in most cases, a canon will only be the starting point of the interpretive analysis. For one thing, most textual canons can be matched with other textual canons that point the other way.<sup>75</sup> Moreover, a substantive canon, such as the rule of lenity in criminal cases,<sup>76</sup> might persuade a judge to err on the side of leniency, even if the textual canon would argue for punishment (that’s how I would have decided the piracy case, for what it’s worth, had I been the Chief Justice in 1818 rather than John Marshall). Beyond that, however, for those judges who believe that looking at legislative history or engaging in purposive analysis are valid methods of interpretation, these sources might very well determine the case, either consistently or inconsistently with the canon. For example, even if I thought the case for applying the reverse *eiusdem generis* canon in the intoxicating liquor cases was weak, I would almost certainly come down in favor of excluding non-intoxicating malt beverages on the ground that the purpose of the legislature was almost certainly to prevent intoxication and not to pursue a senseless vendetta against certain kinds of liquids. The point of the analysis in this section, then, has simply been to suggest certain factors that might weigh more or less heavily in one direction or the other when one decides whether to apply the reverse *eiusdem generis* canon in any particular case.

### III. Reverse *Eiusdem Generis* and *Massachusetts v. EPA*

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<sup>75</sup> Here is my obligatory citation to Llewellyn’s classic piece: Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950). The literature on the usefulness of the canons is extensive. For examples, see Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences* 45 VAND. L. REV. 647 (1992); Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2006).

<sup>76</sup> See n. 15, *supra*.

In the 2007 landmark case of *Massachusetts v. Environmental Protection Agency*,<sup>77</sup> the Supreme Court upheld a challenge to EPA’s decision that it could not and would not regulate greenhouse gases under the Clean Air Act.<sup>78</sup> One of the three major issues in the case involved the question of whether the Clean Air Act gave EPA jurisdiction to regulate greenhouse gases.<sup>79</sup> The issue turned on the interpretation of a statutory provision that the government argued should be read according to the reverse *eiusdem generis* canon, although the government did not actually name the canon, most likely because it did not recognize that there was such a canon. Part A of this section lays out at some length how the parties and judges in the case discussed the statutory issue and then Part B argues that the government’s (and the Court’s) failure to recognize that the statutory language posed a recurring interpretive issue resulted in a highly unsatisfying discussion of the proper meaning of the statute. Given the extreme importance of the underlying issue in the case, this result was regrettable and unfortunate. My hope is by calling attention to the reverse *eiusdem generis* canon, this Article will make it far less likely that such a problem will occur in the future.

A. *Reverse Eiusdem Generis Without “Reverse Eiusdem Generis”*

1. *Before the Agency*

Section 202(a)(1) of the Clean Air Act provides: “The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>80</sup> Section 302(g) of the Act then defines the term “air pollutant” to mean the following:

any air pollution agent or combination of agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.<sup>81</sup>

In 1999, a number of environmental groups petitioned the EPA, asking it to regulate greenhouse gas emissions from vehicles under the Clean Air Act. Fifteen months later, EPA requested public comment on all the issues raised in the petition,

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<sup>77</sup> 549 U.S. 497 (2007).

<sup>78</sup> Scholarly commentary on *Massachusetts v. EPA* is extensive. For examples, see, e.g., Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029 (2008); Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1 (2008); Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. Environmental Protection Agency*, 2007 CATO SUP. CT. REV. 193.

<sup>79</sup> The other major issues in the case, which I will not discuss here, involved Article III standing and a challenge to the agency’s determination that even if the Clean Air Act gave EPA jurisdiction to regulate greenhouse gases, the agency would not choose to exercise that jurisdiction in light of several policy reasons. The Court held against EPA on both issues.

<sup>80</sup> 42 U.S.C. sec. 7521(a)(1).

<sup>81</sup> 47 U.S.C. sec. 7602(g).



including whether the agency possessed jurisdiction to regulate greenhouse gases under the statute. The agency received nearly fifty thousand comments from interested parties.<sup>82</sup> In August of 2003, the General Counsel of EPA, Robert E. Fabricant, wrote a memorandum to the agency's Acting Administrator, Marianne L. Horinko, in which he explained his conclusion that the Clean Air Act "does not authorize EPA to regulate for global climate change purposes" and that therefore "CO<sub>2</sub> and other GHGs cannot be considered 'air pollutants' subject to the CAA's regulatory provisions."<sup>83</sup> This conclusion differed from the interpretation of the statute offered by two prior EPA General Counsels, both of whom had previously expressed their view that the statute did authorize the agency to regulate greenhouse gases.<sup>84</sup>

Fabricant's argument was not first and foremost focused on the language of section 302(g), but rather on a collection of observations about the Clean Air Act as a whole, all of which led to his conclusion that greenhouse gases could not possibly be considered an "air pollutant" under the statute. Most centrally, Fabricant relied heavily on the Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson*,<sup>85</sup> in which the Court held that the Food and Drug Control Act did not authorize the Food and Drug Administration to regulate tobacco. Key to that decision was the notion that if Congress had intended to give the agency expansive and unexpected authority to regulate an important aspect of the nation's economy, it would have said so explicitly.<sup>86</sup> Like the FDCA, which lacked any sort of explicit delegation to the FDA to regulate tobacco, so too, according to the Fabricant memo, did the Clean Air Act lack any sort of explicit delegation to the EPA to address the problem of climate change. "In light of [*Brown & Williamson*]," Fabricant wrote, "it is clear that an administrative agency properly awaits congressional direction on a fundamental policy issue such as global climate change, instead of searching for new authority in an existing statute that was not designed or enacted to deal with that issue."<sup>87</sup> In addition to relying on *Brown & Williamson*, Fabricant also advanced several other arguments about the nature and structure of the Clean Air Act to support his position.<sup>88</sup> Based

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<sup>82</sup> Environmental Protection Agency, Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52924 (Sept. 8, 2003) [hereinafter *Denial of Petition*].

<sup>83</sup> Memorandum from Robert E. Fabricant to Marianne L. Horinko, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (August 28, 2003) [hereinafter *Fabricant Memo*].

<sup>84</sup> See *id.* at 1-3 (describing the position of prior General Counsels).

<sup>85</sup> 529 U.S. 120 (2000).

<sup>86</sup> See *id.* at 159 ("In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation [to an agency to fill in statutory gaps] . . . This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.")

<sup>87</sup> *Fabricant Memo*, *supra* n. 83, at 4.

<sup>88</sup> First, the memo pointed to other provisions of the Clean Air Act supporting Fabricant's view that Congress intended only to give the EPA authority to research greenhouse gases and their relationship to climate change rather than to regulate for the purposes of addressing climate change. *Id.* at 10. Second, the memo argued that the Act's separate section on stratospheric ozone depletion demonstrated that when Congress wanted the EPA to be able to regulate global (rather than local) atmospheric issues, it provided specific and express authority for that regulation. *Id.* Finally, the memo argued that since the Clean Air Act's ambient air quality or "NAAQS" program was "fundamentally ill-suited" to addressing global climate change, Congress could not have intended

on all of these arguments, the Fabricant memo concluded that, “the CAA does not authorize regulation to address global climate change.”<sup>89</sup>

Fabricant’s textual analysis—that greenhouse gases are not “air pollutants” for purposes of section 302(g) of the Act—followed from this conclusion.<sup>90</sup> The memo does engage briefly in an examination of the text of the statute and relies on a reverse *eiusdem generis* argument without naming it as such, but the linguistic analysis facilitates the memo’s conclusion rather than drives it. The core passage from the body of the memo is this one:

The root of the definition [in section 302(g)] indicates that for a substance to be an “air pollutant,” it must be an “agent” of “air pollution.” Because EPA lacks CAA regulatory authority to address global climate change, the term “air pollution” as used in the regulatory provisions cannot be interpreted to encompass global climate change. Thus, CO<sub>2</sub> and other GHGs are not “agents” of air pollution and do not satisfy the CAA section 302(g) definition of “air pollutant” for purposes of those provisions.<sup>91</sup>

Connected to this passage is a footnote where Fabricant criticizes previous EPA interpretations of the relevant provision:

[T]he Cannon memorandum interpreted “air pollutant” to mean “any physical, chemical biological, radioactive . . . substance or matter which is emitted into or otherwise enters “ambient air”—in other words, virtually anything entering the ambient air regardless of whether it pollutes the air. In arriving at this interpretation, the Cannon memorandum failed to address, and effectively read out, the “air pollution agent” language at the core of the definition, thereby ignoring traditional rules of statutory construction.<sup>92</sup>

The footnote continues with a discussion of the provision’s legislative history:

The CAA’s legislative history confirms that “air pollutant agent” is integral to the meaning of “air pollutant.” The original definition of “air pollutant,” added in 1977, included only the core of the definition in effect today—“any air pollutant agent or combination of such

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for the EPA to have regulatory authority over greenhouse gases. The NAAQS program requires states to develop plans to achieve ambient air quality standards for so-called “criteria pollutants” within their borders, but such a requirement makes little sense, according to Fabricant, when it comes to substances like greenhouse gases that do not stay local and instead mix relatively uniformly in the atmosphere around the globe. *Id.* at 7 (“The statutory NAAQS implementation regime is fundamentally inadequate when it comes to a substance like CO<sub>2</sub>, which is emitted globally and has relatively homogenous concentrations around the world.”).

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 10 (“Because the CAA does not authorize regulation to address climate change, it follows that CO<sub>2</sub> and other GHGs, as such, are not air pollutants under the CAA’s regulatory provisions.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 10, n.9.

agents.” In 1977 when Congress sought to address air pollution stemming from radioactive materials, the phrase “including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air” was added to the definition. While Congress did not explain the addition, its context made its purpose clear—to establish that virtually any type of substance, including radioactive substances, *could be* an air pollution agent. If Congress had instead intended to establish that an air pollutant is any physical, biological, chemical or radioactive substance entering the air, however, it presumably would have dropped the “agent” language from the definition as moot.<sup>93</sup>

When EPA issued its final denial of the petition to regulate greenhouse gases on September 8, 2003, it specifically adopted the Fabricant memo “as the position of the Agency for purposes of deciding th[e] petition and for all other relevant purposes under the CAA.”<sup>94</sup> The agency’s analysis tracked the Fabricant memorandum closely, relying heavily on *Brown & Williamson* and focusing on the same aspects of the Clean Air Act relied upon by Fabricant to conclude that the “CAA does not authorize regulation to address concerns about global climate change.”<sup>95</sup> Like the Fabricant memo, EPA’s notice explained that its interpretation of section 302(g) “follow[ed] from this conclusion.”<sup>96</sup> The agency then reiterated verbatim the passage from the Fabricant memo quoted above (without including the memo’s language from the footnote regarding the Cannon opinion or the statute’s legislative history) to conclude that greenhouse gases “are not ‘agents’ of air pollution and do not satisfy the CAA section 302(g) definition of ‘air pollutant’ for purposes of those provisions.”<sup>97</sup> In a footnote, the agency observed that: “As General Counsel Fabricant notes in his memorandum, a substance does not meet the CAA definition of ‘air pollutant’ simply because it is a ‘physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.’ It must also be an ‘air pollution agent.’”<sup>98</sup>

## 2. *At the D.C. Circuit*

A group of states, localities, and non-government organizations filed suit directly in the D.C. Circuit Court of Appeals, challenging EPA’s denial of the petition. In 2005, that court issued a 2-1 decision in favor of the agency.<sup>99</sup> Neither of the two judges in the majority addressed the statutory construction issue at all, as each relied

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<sup>93</sup> *Id.* at 10-11, n. 9.

<sup>94</sup> *Denial of Petition, supra* n. 82, at 52925.

<sup>95</sup> *Id.* at 52928.

<sup>96</sup> *Id.* (“It follows from this conclusion, that GHGs, as such, are not air pollutants under the CAA’s regulatory provisions.”).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 52929 n. 3.

<sup>99</sup> *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50 (D.C. Cir. 2005).

on an alternative theory to reject the petitioners' challenge.<sup>100</sup> Only Judge Tatel in dissent addressed the statutory question, and for him, the issue was straightforward and seemingly quite easy. Quoting section 302(g), Tatel concluded that, "[t]his exceedingly broad language plainly covers GHGs emitted from motor vehicles: they are 'physical [and] chemical . . . substance[s] or matter . . . emitted into . . . the ambient air.'"<sup>101</sup> Tatel also cited a separate provision in the Act which specifically refers to carbon dioxide as an "air pollutant,"<sup>102</sup> and based on this provision and the clear language of section 302(g), concluded that: "Faced with such language, a court—as well as an agency—would normally end the analysis here and conclude that GHGs are 'air pollutants,' since '[w]e must presume that a legislature says in a statute what it means and means in a statute what it says. . . . When the words of a statute are unambiguous . . . this first canon is also the last: judicial inquiry is complete.'"<sup>103</sup> The agency's interpretation, in other words, failed *Chevron* step one.<sup>104</sup>

In the rest of his discussion of the statutory interpretation issue, Judge Tatel considered the government's arguments that other aspects of the statute as a whole (*e.g.*, the *Brown & Williamson* point) showed that Congress could not have intended the agency to regulate greenhouse gases and concluded that these arguments did not suffice to rebut the plain meaning of the statute.<sup>105</sup> Without discussing the government's reverse-*ejusdem-generis*-inspired "air pollution agent" argument at all, Judge Tatel found that: "In sum, GHGs plainly fall within the meaning of "air pollutant" in section 302(g) and therefore in section 202(a)(1). If 'in [the Administrator's] judgment' they 'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,' . . . then EPA has authority—indeed, the obligation—to regulate their emissions from motor vehicles."<sup>106</sup>

### 3. *At the Supreme Court*

The Supreme Court granted cert in the case, heard oral argument, and in a 5-4 decision written by Justice Stevens, somewhat surprisingly held against the agency. On the question of how to interpret section 302(g), the government's brief reiterated all of the same arguments raised by the Fabricant memo, the agency's denial of the petition, and the government itself before the lower court, but it also provided slightly more substance on the reverse *ejusdem generis* argument, though still not recognizing that an actual canon of construction was at play. The Solicitor General argued:

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<sup>100</sup> Specifically, Judge Randolph found that the agency's policy reasons for not regulating were sufficient to uphold its decision, see *id.* at 56-59, while Judge Sentelle found that the challengers lacked standing under Article III of the Constitution to bring the suit, see *id.* at 59-61.

<sup>101</sup> *Id.* at 67 (Tatel, J., dissenting).

<sup>102</sup> See 42 U.S.C. sec 7403(g) (instructing the Administrator to research "nonregulatory strategies and technologies for preventing or reducing multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide.").

<sup>103</sup> *Massachusetts v. EPA*, 415 F.3d at 68 (citations omitted).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 68-73.

<sup>106</sup> *Id.* at 73.

In petitioner’s view, the statutory phrase “any air pollution agent or combination of such agents” is essentially superfluous, because anything that could be viewed as falling with the subsequent “including” phrase, standing alone, necessarily qualifies as an “air pollutant.” But EPA reasonably rejected that view, in favor of an interpretation that gives “air pollution agent” independent meaning. There is no textual difficulty in that approach, under which the “including” phrase merely illustrates the kinds of substances that can qualify as “air pollution agents” without also mandating inclusion of substances that do not, in the agency’s expert view, contribute to “air pollution.” The phrase “any American automobile, including any truck or minivan,” would not naturally be construed to encompass a foreign-manufactured minivan, and the same principle governs here.<sup>107</sup>

In their reply brief, the petitioners responded to the government’s argument this way:

Respondents also now attempt to bolster their extra-textual analysis of the relevant provisions of the Clean Air Act with arguments based on the language of these provisions; these arguments are unpersuasive. EPA’s argument from text amounts to this: “air pollution agents” must have “independent meaning” beyond the items listed in section 302(g)’s “including” clause, and that independent meaning constrains interpretation of the phrase “any chemical, physical . . . substance or matter.” Only those chemical or physical substances that are also “air pollution agents” are covered by the Act. EPA has, however, provided no interpretation of the phrase “air pollution agent” beyond saying that this term does not include greenhouse gases under the Act’s “regulatory provisions.” . . . Contrary to the Solicitor General’s suggestion, petitioners’ interpretation gives independent meaning to the phrase “air pollution agent” (Pet. Br. 14), and thus does not render this term “superfluous.”<sup>108</sup>

The petitioners’ response to the hypothetical “North American vehicle” statute was remarkable in light of the central argument of this Article. In a footnote attached to the previously quoted passage, the petitioners wrote: “The government’s inattention to the statutory text is pointedly illustrated by its invention of hypothetical statutory text as a reason why this statutory text—the relevant provisions of the Clean Air Act—should be read in a particular way.”<sup>109</sup>

In his majority opinion reversing the D.C. Circuit, Justice Stevens paid nearly no attention at all to the government’s reverse *ejusdem generis* without “reverse *ejusdem generis*” argument. For Stevens, like for Judge Tatel, the language of section 302(g) was

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<sup>107</sup> Brief for the Federal Respondent, *Massachusetts v. Environmental Protection Agency*, No. 05-1120 (2006), at 34.

<sup>108</sup> Reply Brief for Petitioners, *Massachusetts v. Environmental Protection Agency*, No. 05-1120 (2006), at 13-14.

<sup>109</sup> *Id.* at 14, n. 10.

crystal clear. “On the merits, the first question is whether section 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions,” Stevens wrote, “We have little trouble concluding that it does.”<sup>110</sup> In response to the agency’s argument that Congress did not intend EPA to regulate substances that cause climate change, Stevens wrote: “The statutory text forecloses EPA’s reading. The Clean Air Act’s sweeping definition of ‘air pollutant’ . . . embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’ . . . The statute is unambiguous.”<sup>111</sup>

In dissent, Justice Scalia argued that the majority’s approach to section 302(g) was a “significant error.”<sup>112</sup> For Scalia, the government’s reverse *ejusdem generis* reading of the statute was at least as plausible as the majority’s interpretation and therefore deserved deference under *Chevron* step-one. Scalia’s analysis of the issue is the most in-depth provided by anybody involved in the case, but even he appeared unaware that courts had been addressing the interpretive problems posed by statutes like section 302(g) for years, either under the reverse *ejusdem generis* label or otherwise. Scalia’s analysis is worth quoting at length:

In order to be an “air pollutant” under the Act’s definition, the “substance or matter [being] emitted into . . . the ambient air” must also meet the first half of the definition—namely, it must be an “air pollution agent or combination of such agents.” The Court simply pretends this half of the definition does not exist. . . . Often . . . the examples standing alone are broader than the general category, and must be viewed as limited in light of that category. The Government provides a helpful (and unanswered) example: [reciting the government’s “any American automobile” example] The general principle enunciated—that the speaker is talking about American automobiles—carries forward to the illustrative examples (truck and minivans), and limits them accordingly, even though in isolation they are broader. Congress often uses the word “including” in this manner [citing three examples<sup>113</sup>] In short, the word “including” does not require the Court’s (or the petitioners’) result. It is perfectly reasonable to view the definition of “air pollutant” in its entirety . . . This is precisely the conclusion EPA reached. [quoting from the agency’s denial of the petition for rulemaking] Once again, in the face of textual

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<sup>110</sup> *Massachusetts v. EPA*, 549 U.S. at 528.

<sup>111</sup> *Id.* at 529.

<sup>112</sup> *Id.* at 555 (Scalia, J., dissenting).

<sup>113</sup> The examples are 28 U.S.C. sec. 1782(a) (referring to “a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation”); 2 U.S.C. sec. 54(a) (“The Clerk of the House of Representatives shall, at the request of a Member of the House of Representatives, furnish to the Member, for official use only, one set of a privately published annotated version of the United States Code, including supplements and pocket parts”); and 22 U.S.C. sec. 2304(b)(1) (“the relevant findings of appropriate international organizations, including non-governmental organizations”). *Massachusetts v. EPA*, 549 U.S. at 557 (Scalia, J., dissenting).

ambiguity, the Court’s application of Chevron deference to EPA’s interpretation of the word “including” is nowhere to be found.<sup>114</sup>

B. *Why “Reverse Eiusdem Generis” Matters.*

As this lengthy account demonstrates, the EPA, the Justice Department, and four Justices of the Supreme Court all argued consistently that section 302(g) of the Clean Air Act was subject to a reverse *eiusdem generis* interpretation that rendered it at least ambiguous, such that the government should have received *Chevron* deference for its reading of the statute. Not a single lawyer, however—not the General Counsel of the EPA nor the Solicitor General of the United States nor even Justice Antonin Scalia—ever expressly named the reverse *eiusdem generis* canon or cited any cases, such as the ones described in Section I of the Article, in which judges had previously wrestled with similar interpretive problems. My purpose in the balance of this Section is limited. I will not try to comprehensively address the issue of how the statute should have been read. That task would require consideration of wide range of arguments—not only the ones cited by the Fabricant memo but also the meaning of the word “any,” the application of *Chevron*’s two steps, and some others as well—far afield from the topic of the Article. Instead, I want simply to explain how the failure of everyone involved in the case to recognize that section 302(g) posed recurring interpretive issues that courts applying the reverse *eiusdem generis* canon either explicitly or not have been struggling with since at least the early nineteenth century rendered the discussion of the statute’s meaning incomplete and unsatisfying in at least three ways.

First, by not naming the reverse *eiusdem generis* canon or citing actual decided cases involving interpretation of statutes similar in form to section 302(g), the government and Justice Scalia likely made it much easier for the Supreme Court majority to ignore their arguments about the meaning of the statute. Although Justice Stevens briefly addressed the *Chevron* step two inquiry in a footnote,<sup>115</sup> the majority opinion did not consider the *Chevron* step one inquiry at all, except to assert without any real argument that the statute was “unambiguous,” presumably because of the presence of the word “any” before both the catch-all and the list of enumerated items. This assertion, however, entirely ignored the government’s plausible reverse *eiusdem generis* argument that to be an air pollutant, a substance must be fall within the list of enumerated items *and* be an “air pollution agent,” leaving the reader (and the parties) wondering whether the majority disagreed with the argument, agreed with the argument but didn’t address it because it thought it didn’t have to, given its conclusion on *Chevron* step-two, didn’t understand the argument, thought the argument was frivolous, or just didn’t even notice the argument. As someone who teaches courses in environmental law, administrative law, and legislation, I’ve probably taught

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<sup>114</sup> *Id.* at 556-58. Justice Scalia went on to explain why it was reasonable under *Chevron* step two for EPA to have concluded that greenhouse gases were not “air pollution agents.” *Id.* at 558-60. Justice Stevens responded briefly to this part of Justice Scalia’s argument in a footnote, *id.* at 529, n. 26 (critiquing EPA’s position that greenhouse gases are not “air pollution agents” because they “permeate the world’s atmosphere rather than a limited area near the earth’s surface” as “plainly unreasonable”), but he did not respond to Scalia’s analysis regarding the reverse *eiusdem generis* issue.

<sup>115</sup> *See* n. 114, *supra*.

*Massachusetts v. EPA* at least twenty-five times, and every time I throw my hands up in the air when I try to explain what the majority thought about Justice Scalia's interpretation of the statute. I'm a bleeding-heart liberal environmentalist, but I'm consistently frustrated by how cavalierly the majority opinion blew off an entirely reasonable argument on *Chevron* step one.

There's no way to know for sure, of course, but it seems probable that if the government and Justice Scalia had identified their interpretive argument as resting on a well-recognized and named canon of statutory construction that had been relied upon by courts numerous times in the past, the majority would have felt a greater need to address the argument directly rather than ignoring it. As it is, by providing no precedential support whatsoever for reading a statute in a reverse *ejusdem generis* manner, the government and the dissent made it appear that they were inventing their fashion of reading the statute out of whole cloth. It makes some sense that Justice Stevens would have given Justice Scalia's argument much more weight and consideration if it had been presented as a position with serious pedigree in the law rather than being packaged in an entirely ahistorical fashion. Of course, Justice Stevens should have addressed Justice Scalia's argument anyway, but by not contextualizing the argument and putting it forward as a familiar one, the government and Scalia made it much more likely that the majority would feel as if they could get away without addressing it directly.

Second, by failing to recognize that section 302(g) presented a recurring interpretive issue, the government was unable to take advantage of prior cases presenting real world examples of the reverse *ejusdem generis* canon and therefore was forced to craft its own example—"any American automobile, including any truck or minivan"—which turned out to be unhelpful and probably counter-productive. The example did not help the government or Justice Scalia for at least two reasons. For one thing, as the petitioners' reply brief suggested, using a hypothetical statute instead of a real one reinforced the notion that the government and Justice Scalia were inventing their interpretive argument rather than relying on a time-tested one and thus made the argument appear less weighty and easier to ignore.

At least as important, though, the example was unhelpful because it was highly inapposite given the actual statute at issue. The hypothetical has two important features that make it a much easier case for application of the reverse *ejusdem generis* canon than section 302(g)—features that correspond to points four and five described in Section II of the Article.<sup>116</sup> First, it is much more generally known in the hypothetical that the enumerated items contain subsets that would not be covered if limited by the catch-all than it is in section 302(g). Everybody knows that there are trucks and minivans in the world that are not American. But it's far from clear that there are necessarily physical, chemical, biological, or radioactive substances that enter the ambient air but that are not "air pollution agents." This point is related to the second point that the phrase "American automobile" is more precise than the phrase "air pollution agent." Everyone knows what an American automobile is, but the

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<sup>116</sup> See text accompanying notes 74-75, *supra*.



phrase “air pollution agent” is highly nebulous. Thus, section 302(g) is harder to read consistently with the reverse *ejusdem generis* canon than the government’s hypothetical. The majority of the Supreme Court may well have recognized that the hypothetical was very different from section 302(g), and that might have led it to conclude that the government’s argument was particularly weak. Readers of the opinion, too, are likely to at least instinctively realize that the hypothetical is quite different from the actual statute being interpreted and to therefore find the dissent’s argument unpersuasive and unsatisfying.

Finally, by failing to cite and examine prior cases involving statutes subject to reverse *ejusdem generis* interpretations, the government left the Court with no real-world examples against which it could test the plausibility of reading section 302(g) consistently with the canon. Had the government cited the string of cases described in Part I of this Article, for example, both the majority and the dissent could have educated themselves on how statutes that are potentially subject to being read in a reverse *ejusdem generis* manner differ in a variety of ways that make the canon more or less appropriate in different situations. Specifically, they might then have recognized that the level of precision in the catch-all term is an important factor for determining whether it makes sense to read a statute in a reverse *ejusdem generis* manner. In turn this might have led them to consider whether the phrase “air pollutant agent” is a sufficiently precise term best read to limit the list of enumerated items or whether instead it is a general term best read as a phrase chosen for convenience to describe the items in the list. Of course, this question would have been complicated by the fact that the catch-all phrase existed by itself in the first iteration of the statute, and only became accompanied by a list of enumerated items later, when Congress wanted to specify that radioactive substances can be (must be?) “air pollution agents.”<sup>117</sup> It is not immediately obvious which way this quirk of legislative history cuts, and it would have been highly informative for the Court to have considered the issue. In any event, regardless of whether the justices would have ended up focusing on the same factors that I have focused on in this Article, there is no doubt that the Court’s treatment of the interpretive issue posed by section 302(g) would have been enriched by a consideration of other cases involving other statutes decided by other courts struggling with extremely similar questions.

## Conclusion

Ultimately, one of my hopes in writing this Article is that what happened in *Massachusetts v. EPA* never happens again. Faced with a potentially ambiguous statute, the government put forward a plausible interpretation of section 302(g) but without recognizing and thus being able to explain how prior courts have interpreted similar statutes in the manner that it favored. This left the petitioners and ultimately the majority of the Supreme Court unable to appreciate the seriousness of the government’s argument. This is emphatically not to say that the majority of the Court interpreted the statute incorrectly or reached the wrong result. But it is emphatically

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<sup>117</sup> See text accompanying notes 92, *supra*.

to say that the Court's decision was much less satisfying and persuasive than it could have been. Given the extreme importance of the subject matter of the case, this was highly unfortunate.

The canon of reverse *ejusdem generis* has a long history in the law, and although it has been mostly ignored by those who care about statutory interpretation, it does not deserve that fate. My second and more important hope in writing this Article is that the reverse *ejusdem generis* canon begins to get the attention that it warrants. The canon of statutory interpretation canons should be opened to allow this new canon entry into the canon. It should be discussed in casebooks, in treatises, in law school courses, in briefs, and in cases. It should be called by its name and treated with respect. In short: Long live reverse *ejusdem generis*!<sup>118</sup>

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<sup>118</sup> I would have translated this sentence fully into Latin but I don't know how and I don't trust Google Translate.